

CONSENT LAW SEMINAR

MAY 14 / BURBANK /



California
Hospital
Association

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Disclaimers for Consent Seminar (because we're lawyers)

- These presentations are solely for **educational purposes** and do not represent the views of our employers.
- These presentations do not constitute legal advice, or its application to the delivery of health care services.
- Attendees should consult with their own legal counsel and/or risk management for advice and guidance.

Advanced Consent and Other Issues

Who Can Consent?

1. Adult with Capacity

- 18 years old (or minor law treats as adult), and have “capacity” at the time of the health care decision (i.e. able to understand the nature and consequences of the treatment, including benefits, risks and alternatives)

2. Patient-Appointed Agent/Surrogate

- Advance Health Care Directive
- Oral Designation

3. Surrogate Decisionmaker

- Health care provider caring for the patient may choose a surrogate to make health care decisions on the patient’s behalf, as appropriate.

4. Conservator

Adult With Capacity

- Must have reached age of 18 or be a minor the law treats as an adult
- Has “capacity” at the time of the health care decision
 - Able to understand the nature and consequences of the proposed health care treatment, including its significant benefits, risks, and alternatives.
 - Able to make and communicate a decision about it.
- Patient is presumed to have capacity to make a health care decision, to give/revoke an advance directive, and to designate/disqualify a surrogate
 - If there are indications patient may not have capacity, physician must decide patient’s capacity.
 - No presumption of incapacity based on evaluation/treatment for mental disorder or chronic alcoholism (whether voluntary or involuntary) or developmental disability.

Competency versus capacity

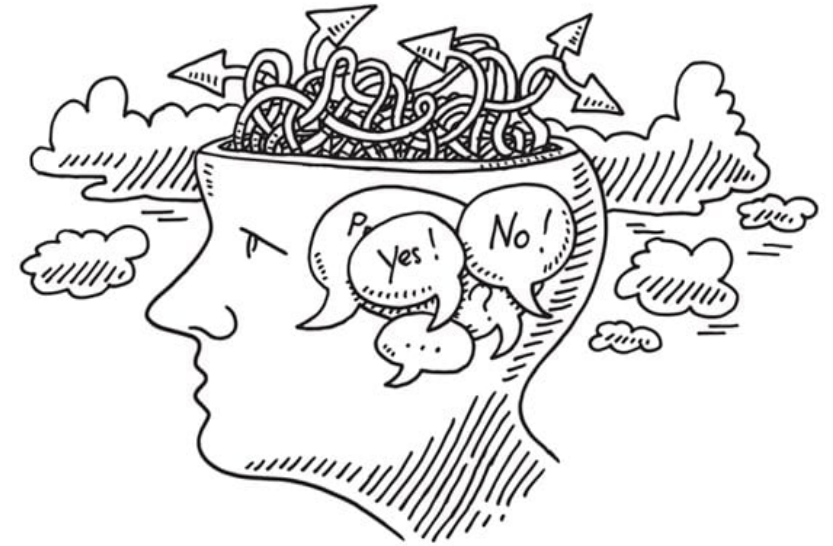
Competency

- A legal term (sometimes referred to as “legal capacity”) referring to an individual’s ability and legal right to make their own decisions.
- It is a broad concept encompassing many legally recognized activities, such as the ability to enter into a contract, to prepare a will, to stand trial, to make medical decisions, etc.
- The determination of incompetence is a judicial decision — decided by a court and has legal consequences with respect to the individual’s rights. An adjudication of incompetency effectively denies an individual the autonomy to make decisions
- In terms of health care, competency is an issue in guardianship and conservatorship hearings.
- It is usually informed by a clinical assessment of capacity.

Competency Versus capacity

Capacity (Decision-making Capacity)

- A clinical assessment and determination of a patient to make health care decisions made by a physician (often, but not exclusively by a psychiatrist).
- Criteria for decisional capacity
 - Understanding
 - Appreciation
 - Reasoning
 - Expression of choice



Issues With Capacity Determinations

- Disagreement with clinical/medical guidance \neq lack of capacity.
- Refusal of treatment that may be clinically rational \neq lack of capacity.
- Depression \neq lack of capacity.
- Capacity can wax and wane.



Patient-Appointed Agent

ADVANCE HEALTH CARE DIRECTIVE

(California Probate Code Section 4701)

Explanation

You have the right to give instructions about your own physical and mental health care. You also have the right to name someone else to make those health care decisions for you. This form lets you do either or both of these things. It also lets you express your wishes regarding donation of organs and the designation of your primary physician. If you use this form, you may complete or modify all or any part of it. You are free to use a different form.

Part 1 of this form is a power of attorney for health care. Part 1 lets you name another individual as agent to make health care decisions for you if you become incapable of making your own decisions or if you want someone else to make those decisions for you now even though you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. (Your agent may not be an operator or employee of a community care facility or a residential care facility where you are receiving care, or your supervising health care provider or employee of the health care institution where you are receiving care, unless your agent is related to you or is a coworker.)

Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. This form has a place for you to limit the authority of your agent. You need not limit the authority of your agent if you wish to rely on your agent for all health care decisions that may have to be made. If you choose not to limit the authority of your agent, your agent will have the right to:

- (a) Consent or refuse consent to any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition.
- (b) Select or discharge health care providers and institutions.
- (c) For all physical and mental health care, approve or disapprove diagnostic tests, surgical procedures, and programs of medication.
- (d) Direct the provision, withholding, or withdrawal of artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.
- (e) Donate your organs, tissues, and parts, authorize an autopsy, and direct disposition of remains.

Part 2 of this form lets you give specific instructions about any aspect of your health care, whether or not you appoint an agent. Choices are provided for you to express your wishes

Written Advance Healthcare Directive

1. Durable Power of Attorney for Health Care
2. Individual Health Care Instructions

Requirements

- Date: must contain the date of its execution.
- Signature: must be signed by either (i) the patient or (ii) in the patient's name by another adult, in the patient's presence and at the patient's direction (e.g. patient can't write).
- Notary or Witnesses: must be acknowledged before a notary public or signed by at least 2 witnesses.

Patient-Appointed Surrogate

Oral Designation

- Patient can orally designate a surrogate decisionmaker.
- Patient personally informs the supervising health care provider or a designee of the facility who they wish to act as their health care decisionmaker (surrogate).
- Surrogate (designated orally) takes precedence over an agent identified in a durable power of attorney.
- Unless the patient specifies a shorter period of time, the designation of surrogate is effective only for the shorter of:
 - The course of treatment/illness or stay in the health care institution when the surrogate designation is made, or
 - 60 days.

(Probate Code § 4711)

Surrogate Decisionmaker

Patient does not have an AHCD and did not orally designate a surrogate

- Health care provider or a designee of the health care facility caring for the patient may choose a surrogate to make health care decisions on the patient's behalf, as appropriate.
- Qualifications of surrogate:
 - Adult
 - Demonstrated special care and concerns for the patient
 - Familiar with patient's personal values and beliefs to the extent known
 - Reasonably available and willing to serve
- Surrogate to be chosen from among the following (no order of priority)
 - Spouse/domestic partner
 - Adult child
 - Parent
 - Adult sibling
 - Adult grandchild
 - Adult relative or close personal friend

Agent/Surrogate Authority

An agent or surrogate may not consent to the following on behalf of a patient:

- Commitment to or placement in a mental health treatment facility
- Convulsive treatment
- Psychosurgery
- Sterilization
- Abortion
- Administration of aid-in-dying medication

Conservatorship

LPS CONSERVATORSHIP	PROBATE CONSERVATORSHIP
To provide individualized psychiatric treatment, supervision, and placement for a patient who is gravely disabled	Of the person: responsible for individual's care and protection Of the estate: responsible for financial matters
Limitations: <ul style="list-style-type: none">• Cannot consent to, or refuse, routine medical treatment of patient• Can authorize admission of the patient to a mental health facility	Cannot consent (without specific authorization) to: <ul style="list-style-type: none">• Placement in a mental health treatment facility against patient's will• Experimental drugs• Convulsive treatment• Sterilizing a minor



Murphy conservatorship - a specialized civil commitment under the Lanterman-Petris-Short (LPS) Act that applies to a criminal defendant who has been found mentally incompetent to stand trial and is considered dangerous to others.

Multiple Decisionmakers

If a patient lacks the capacity to make a health care decision, the following legally recognized health care decisionmakers may make health care decisions on the patient's behalf, **in the following descending order of priority**:

1. The patient's surrogate selected pursuant to Section 4711 [oral designation];
2. The patient's agent pursuant to an advance health care directive;
3. The conservator of a patient having authority to make health care decisions for the patient.

(Probate Code § 4712)

No Decisionmaker

Adult lacks capacity, not under a conservatorship, and no available decisionmaker

- Generally, unless emergency medical situation exception applies, medical treatment should be withheld until:
 - Patient regains capacity
 - Identify patient-appointed agent or surrogate
 - Court order designating a person
 - Conservator appointed
- California law has no comprehensive statutory scheme for consent to treatment on behalf of patients in acute care hospitals who lack capacity to make health care decisions and are unrepresented.
 - But look to interdisciplinary team (IDT) requirements for SNFs

Who Consents for a Minor?

General Rule:

- Minors lack legal authority to consent to their own care. Parents have the right to control the care of their minor child by consenting to or refusing care. In the absence of an authorized parent, third parties may consent on behalf of the minor as authorized.
- Whoever has authority to consent to treatment on behalf of a minor has the corresponding authority to refuse treatment for the minor.
- Exceptions: In some circumstances, minors have legal authority to consent to their own care. These exceptions are based on either:
 - The status of the minor (emancipated, self-sufficient, marrier, active duty) OR
 - The nature of the treatment in issue (e.g. repro health, assault, mental health).

When Can Minors Consent for Themselves?



Status-Based Consent: Full Adult Rights for Specific Minors

Minor Consent Allowed

Court-Emancipated Minors

- Age requirement: 14+.
- Minor can consent to medical, dental, or psychiatric care.
- Verification required: DMV-issued Emancipated Minor Identification Card.



Minor Consent Allowed

Active Duty Military

- Age requirement: Any age.
- Emancipated by virtue of active service in the U.S. Armed Forces.
- Verification required: Active duty military ID card.



Minor Consent Allowed

Married / Previously Married

- Age requirement: Any age.
- Emancipation remains valid even if the marriage ends in divorce or death.
- Verification required: Marriage or domestic partnership certificate.



Treatment-Based Consent for Minors

MENTAL HEALTH & REPRODUCTIVE CARE



Outpatient Mental Health Treatment

12+

Minors can consent if attending professional deems them mature enough to participate intelligently.



NO AGE REQUIREMENT

Pregnancy Prevention & Treatment

There is no minimum age requirement for services related to the prevention or treatment of pregnancy.

TRAUMA & PERSONAL SAFETY



Rape & Sexual Assault Diagnosis

12+

Minors have the legal right to consent to medical diagnosis and treatment related to rape or sexual assault.



Intimate Partner Violence

12+

Youth may independently consent to diagnosis and treatment related to intimate partner violence.

INFECTIOUS DISEASES & SUBSTANCE USE



Infectious & Communicable Diseases

12+

Minors can consent to the diagnosis or treatment of contagious or communicable diseases.



General Drug & Alcohol Counseling

12+

Medical care and counseling for drug- or alcohol-related problems are accessible with minor consent.



Opioid Use Disorder (Buprenorphine)

16+

Consent for buprenorphine treatment at a physician's office/clinic specifically requires the minor to be 16 years or older.

Pregnancy and contraception care

- **Any minor** may consent to hospital, medical, or surgical care related to treatment or prevention of pregnancy.
- Law doesn't specify the treatments, but generally assumed contraception (incl emergency contraception), abortion, pelvic exams, pregnancy testing, and prenatal care.
- Excludes sterilization.

Infections, contagious or communicable diseases

- **12+** who may have come into contact with infectious, contagious or communicable disease that must be reported to the local health officer, or STD may consent to diagnosis and treatment of the disease.
- This includes HIV testing.
- **12+** may consent (or refuse consent) for the HPV vaccine.

Rape/sexual assault victims

- **12+** who has allegedly been raped, may consent to diagnosis and treatment, including withhold consent for the collection of evidence of alleged rape.
- **Any minor** who has allegedly been sexually assaulted may consent to diagnosis and treatment (but parents must be contacted unless suspected perpetrator).

Intimate partner violence

- **12+** may consent to diagnosis and treatment related to intimate partner violence.

Outpatient mental health treatment

- **12+** and if minor, in the opinion of the attending professional person, is mature enough to participate intelligently in the outpatient services.

Medical care and counseling relating to the diagnosis and treatment of a drug- or alcohol-related problem

- **12+** may consent to medical care and counseling related to diagnosis and treatment of a drug- or alcohol-related problem.

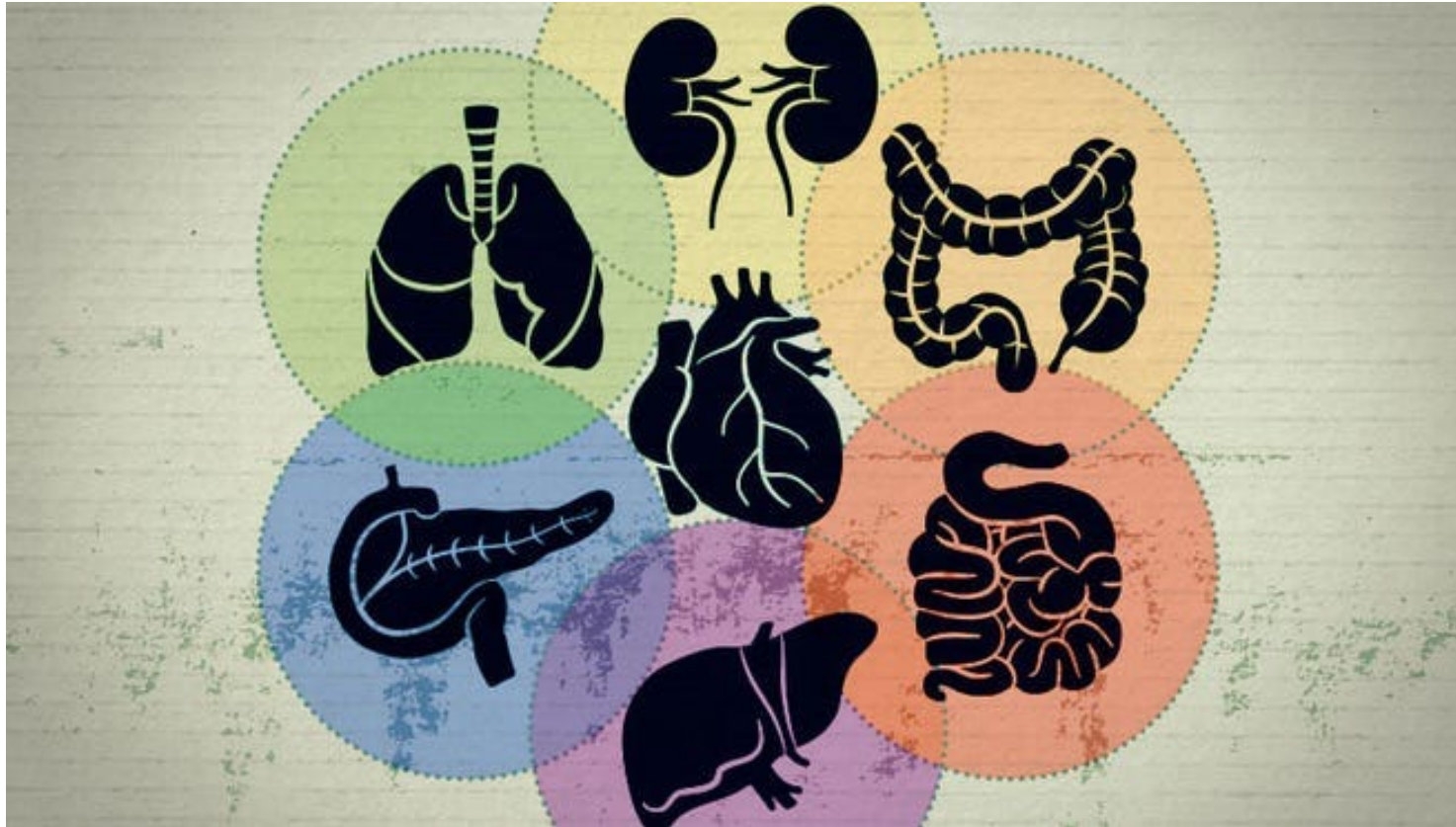
Substance abuse treatment

- **16+** may consent to opioid use disorder treatment that uses buprenorphine at a physician's office, clinic, or health facility, by a licensed physician and surgeon.

Minors Privacy

GENERAL RULE	EXCEPTIONS
<p>Where a minor has the right to consent to treatment, the minor may decide who is authorized to see the records related to that treatment.</p>	<p><u>Self-Sufficient Minors</u>: Law permits disclosure to a parent with or without consent if they know the “whereabouts” of the parent. CA Family Code 6922.</p>
	<p><u>Victims of Sexual Assault</u>: Law requires “attempt to contact the minor’s parent” except if believe parent committed the assault. CA Family Code 6928.</p>
	<p><u>Outpatient Mental Health</u>: “Shall include involvement of the minor’s parent,” unless after consulting with the minor, determines that involvement would be inappropriate. CA Family Code 6924.</p>
	<p><u>Drug or Alcohol Related Treatment</u>: Law requires disclosure to parent even if minor does not consent <i>if</i> the parent is the one who sought the care. CA Family Code 6929. BUT Part 2 (42 CFR 2.14) only allows disclosure if minor lacks capacity and minor’s situation poses a substantial threat to the life or physical well-being of the minor other person. See <i>also</i> Cal. Health & Safety Code § 11845.5 (DHCS); LPS.</p>
GENERAL RULE	EXCEPTIONS
<p>Where minor does not have the right to consent to treatment, then parent/guardian is allowed to see records related to the treatment</p>	<p><u>Assents to Confidentiality</u>: HIPAA provides that a parent need not be treated as a minor patient’s personal representative for purposes of PHI disclosures and other requirements if the parent “assents to an agreement of confidentiality” between the covered entity and minor with respect to such health care service. 45 C.F.R. 164.502(g)(3)(i)(C).</p>
	<p><u>Access → Detrimental to Minor</u>: Parent not entitled to minor’s health records if provider determines access would be detrimental minor’s physical safety or psychological well-being or to the provider/patient relationship. This decision shall not attach any liability to the provider, unless the decision is found to be in bad faith. Cal. Health & Safety Code § 123115</p>
	<p><u>Dependent Children</u>: Court may remove birth parents/legal guardian right to access minor’s health information in conjunction with the juvenile court’s removal of the physical custody of the minor where risk of abuse or harm. A psychotherapist may not disclose mental health information to a child who has been removed from physical custody unless authorized by the court. Cal. Health & Safety Code § 123116.</p>

Consent for Anatomical Gifts



First-Person Authorization/Consent

An anatomical gift of a donor's body or part may be made during the life of the donor by:

- The donor, if the donor is an adult.
- A minor if the minor is (1) an emancipated minor or (2) the minor is between 15 and 18 years of age and parent/guardian has provided written consent.
- The agent of the donor, provided the power of attorney for health care or other record expressly permits this.

(Health and Safety Code § 7150.15)

An anatomical gift is valid through any of the following :

- Donor symbol on a driver's license or ID card
- Registration through the California Donor Registry
- A will or advance directive
- Patient's express intent, supported by two adults (at least one of whom is a disinterested witness), which is memorialized in a signed and dated writing.

(Health and Safety Code § 7150.20)

Revocation of First-Person Consent

An anatomical gift may be revoked through any of the following:

- Manual removal from the California Donor Registry.
- A written and signed amendment or revocation by the donor.
- Written revocation by a third party with express written consent of the donor (in writing and witnessed by two adults, one of whom must be disinterested).
- Clear expression of intent by the donor witnessed by two adults, one of whom is disinterested.



Implications of First-Person Authorization/Consent

- There is a presumption of validity of a document of an anatomical gift is valid. (Health & Safety Code § 7150.85)
- First-person consent (authorization) means that an individual's legally valid decision to donate their organs or tissues after death is binding and does not require approval by family or surrogates or physicians.



Terms and Conditions

By submitting this registration I affirm that I am the applicant described on this application and that the information entered herein is true and correct to the best of my knowledge. This registration will serve as a document of gift as outlined in the California Uniform Anatomical Gift Act. A document of gift, not revoked by the donor before death, is irreversible and does not require the consent of any other person. It also authorizes any examination necessary to ensure the medical acceptability of the anatomical gift.

- Yes, I accept the Terms and Conditions and wish to donate my selected organs and tissues to save or enhance someone's life through transplantation.**

Patient's Rights to Caregiver Preference



Failure to Seek a Patient's Preference for Caregiver's Gender – Violation of Patients' Bill of Rights

Sobalvarro v. Vibra Health Care (2026) 119 Cal.App.5th 748

- Plaintiff Jessica Sobalvarro was admitted to Kentfield Hospital to recover from a paralyzing stroke that left her unable to speak. Kentfield's nursing staff provided intimate care for Sobalvarro, including bathing and toileting, and a male nursing assistant provided much of that care.
- Throughout her stay, Sobalvarro's family and friends observed her crying and appearing sad.
- After sufficiently regaining her speech, Sobalvarro sued Kentfield, its corporate parent (Vibra Health Care), and the male nurse. She pleaded claims for dependent adult abuse, negligence, battery, and assault, alleging the male nurse had sexually assaulted her.
- The jury found the male nurse was not liable, but it found Kentfield and Vibra negligent for violating the Patients' Bill of Rights (Cal. Code Regs., tit. 22, § 72527 et seq.) by failing to seek the patient's preference regarding her caregiver's gender and awarded \$1 million in noneconomic damages.
- The trial court granted JNOV for defendants, ruling that causation could not be established once the jury exonerated the male nurse. Sobalvarro appealed.
- The Court of Appeal reversed, holding that substantial evidence supported the jury's liability finding. The court explained that, because it was undisputed that Sobalvarro would have opted for care by a female nurse had Kentfield given her that choice, the jury could infer that some of her distress stemmed from "receiving daily intimate care, while paralyzed and unable to move or speak, over a lengthy period from a male nurse, contrary to her wishes, and as a direct result of Kentfield's negligence" in failing to give her the option of female nursing care.

Service Animals

What is a service animal?

- A dog that is individually trained to perform work or tasks that benefit a person with a disability, including a physical, sensory, psychiatric, intellectual, or other type of mental disability.
- Federal regulations provide that miniature horses must be allowed as service animals in businesses and public spaces if they are individually trained to benefit an individual with a disability and can be reasonably accommodated.
- An animal is not a service animal if its mere presence benefits the individual with a disability.



Service Animals

Where are service animals allowed?

- Service animals must be allowed anywhere in the hospital or health care facility where health care personnel, patients and visitors are allowed to go, including lobbies, waiting rooms, examination rooms, patient rooms, cafeteria, etc.
- Patients must be able to care for the animal or must arrange for someone else to care for the animal if necessary.
- Hospitals and health care facilities may ask if an animal is a service animal required because of a disability but may not require certification or other documentation of service animal status or the individual's disability.

Possible exclusions

- Service animals may be excluded from limited access areas of hospitals that employ general infection-control measures, such as operating rooms and burn units.
- Hospital and health care facilities are not required to allow access to service animals that pose a direct threat to others, are not under the handler's care and control.